

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: June 10, 2003

Paper No. 9

csl

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Sleep-N-Aire Licensing Group, Inc.

v.

Pacific Coast Feather Company

Opposition No. 124,000
to application Serial No. 75/640,170
filed on February 10, 1999

James E. Shlesinger of Shlesinger, Arkwright & Garvey LLP
for Sleep-N-Aire Licensing Group, Inc.

Clark A. Puntigam of Jensen & Puntigam, P.S. for Pacific
Coast Feather Company.

Before Simms, Quinn and Bucher, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Sleep-N-Aire Licensing Group, Inc. ("opposer"), a
Texas corporation, has opposed the application of Pacific
Coast Feather Company ("applicant"), a Washington State
corporation, to register the mark SLEEPRIGHT for "pillows
for sale in retail outlets serving the general public,

excluding institutional furniture and accessories therefore [sic], including pillows."¹

In the notice of opposition, opposer alleges that, prior to applicant's filing date, opposer sold bedding, mattresses, beds and related products, both to the general public and to institutional consumers; that it has used such marks as SLEEP RITE, SLEEP RITE FIRM, and the registered marks SUPERIOR SLEEPRITE ("SUPERIOR" disclaimed) in the form shown below:

SUPERIOR *Sleeprite*

for institutional furniture consisting of dressers, chests, beds, desks, nightstands, bedside cabinets, chairs, settees and tables,² and TO LIVE RIGHT SLEEP RITE for beds;³ and that applicant's mark SLEEPRIGHT so resembles opposer's marks as to be likely to cause confusion, to cause mistake or to deceive. Applicant has denied the allegations of the opposition except that applicant admitted that opposer is

¹ Application Serial No. 75/640,170, filed February 10, 1999, based on applicant's allegation of a bona fide intention to use the mark in commerce.

² Registration No. 920,186, issued Sept. 14, 1971, twice renewed.

³ Registration No. 1,174,244, issued Oct. 20, 1981, renewed.

Opp. No. 124,000

the owner of the pleaded registrations to the extent that Office records are correct.

The record of this case consists of opposer's notice of reliance on status and title copies of its pleaded registrations and on its request for admissions which, according to opposer, applicant did not timely answer, and the application file. Applicant submitted no testimony or evidence. Both parties filed briefs but no oral hearing was requested.

We turn first to an evidentiary matter--whether opposer's request for admissions should be deemed admitted in view of applicant's failure to timely respond. In its brief applicant contends that opposer's notice of reliance should be stricken to the extent that it does not take into account applicant's answers to the request for admissions. Briefly, the facts concerning this matter are the following. Opposer served its discovery requests on the last day of the discovery period (April 29, 2002, the Monday following the April 27, 2002 closing date). On June 4, 2002 and July 3, 2002, applicant's counsel faxed to opposer's counsel requests to extend the time for responding to the discovery requests due to vacation schedules and business travel, as well as the need to peruse a substantial number of applicant's files.

Opp. No. 124,000

Applicant also stated in the requests that it would agree to extend all other relevant deadlines. According to applicant, no objection was made by opposer's counsel either verbally or in writing to either of these requests. It appears that opposer's counsel simply took no action with respect to the faxed requests.

Opposer argues that applicant's requests to opposer's counsel for extensions of time were not sufficient, and that applicant may not rely on opposer's counsel's inaction to establish that applicant's own neglect was excusable. Applicant filed no formal request or motion to extend the time for responding to discovery with the Board. Applicant eventually submitted its responses to opposer's discovery requests on August 2, 2002, after opposer's testimony period had closed.

We agree with opposer that these disputed requests for admission should be deemed admitted. If a party upon which requests for admission have been served fails to timely respond thereto, the requests will stand admitted unless the party is able to show that its failure to timely respond was the result of excusable neglect, or unless a motion to withdraw or amend the admissions is filed pursuant to Rule 36(b), and granted by the Board. See Fed. R. Civ. P. 6(b) and 36(a). See also TBMP §411.01. Any

matter admitted (either expressly or for failure to timely respond) under Rule 36 is conclusively established unless the Board, upon motion, permits withdrawal or amendment of the admission. See Fed. R. Civ. P. 36(b). See also TBMP §411.04. Here, applicant did not file a request or a motion to extend its time for responding to the request for admissions with the Board; applicant only requested such relief from opposer's counsel. Moreover, after opposer relied on these admissions during its testimony period, applicant did not promptly file a motion to withdraw these admissions but, while it furnished belated responses after opposer's testimony period elapsed, waited until its brief to argue that its responses should be accepted, at which time applicant submitted its responses. Applicant did not file a motion to reopen to try to show that its failure to respond timely was due to excusable neglect. Nor did applicant promptly file a motion to strike opposer's notice of reliance upon the request for admissions. Under these circumstances, we believe that the disputed requests should stand admitted. We therefore deem admitted the facts that applicant is a competitor of opposer in the business of making and selling bedding products, that applicant's products are very similar to opposer's, and that applicant

Opp. No. 124,000

did not use its mark prior to the filing date of its application.

Turning now to the merits of this case, it is opposer's position that its registered marks SUPERIOR SLEEPRITE and TO LIVE RITE SLEEP RITE are similar in sound, appearance and meaning to applicant's mark SLEEPRIGHT. Further, opposer argues, in view of the admissions, that applicant's mark is applied to goods "identical" to opposer's, and that the parties are competitors. Opposer also asks us to resolve any doubt on the issue of likelihood of confusion in its favor.

Applicant, on the other hand, points to the specific differences in the sight, sound and meaning of the marks, the fact that opposer's mark SLEEP RITE is presented as two words in one of its marks, with RITE spelled differently from the conventional spelling of RIGHT in applicant's one-word mark, that opposer's mark SUPERIOR SLEEPRITE is displayed in "memorable script," and that a consumer's attention will be directed to the entire slogan TO LIVE RITE SLEEP RITE and not just to the SLEEP RITE portion of that mark. With respect to the goods, applicant argues that its pillows will be sold in separate departments of any retail stores that may carry opposer's furniture items, or they may be sold in different stores entirely.

Opp. No. 124,000

Applicant also argues that opposer's institutional furniture is not usually sold in ordinary retail stores but through distributors, specialty stores or catalogs. Finally, applicant contends that, in view of the "personal" nature of the goods, care and thought will be involved in the purchasing decision because these goods are not bought on impulse.

First, because opposer is the owner of valid and subsisting registrations, priority is not an issue in this case. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); and *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995).

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated*

Opp. No. 124,000

Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the marks--SUPERIOR SLEEPRITE and TO LIVE RIGHT SLEEP RITE vs. SLEEPRIGHT--we conclude that these marks are likely to cause confusion if used in connection with the same or similar goods. First, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The reason for this is that such a comparison is not ordinarily the way that customers will be exposed to the marks. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial

impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Here, the word "SUPERIOR" in opposer's mark SUPERIOR SLEEPRITE and the words "TO LIVE RIGHT" in the mark TO LIVE RIGHT SLEEP RITE are either descriptive or have little source-indicating significance. The primary source-indicating word in opposer's marks (SLEEPRITE and SLEEP RITE) is identical in pronunciation and meaning and very similar in appearance to applicant's mark SLEEPRIGHT. If used on related goods, these marks would be likely to cause confusion.

Turning next to the question of the similarity of the respective goods, it is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion, as long as they are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB

1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1898 (TTAB 1989); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Also, our analysis of the relatedness of the goods, their channels of trade, and classes of consumers is governed, not by what the record shows but, rather, by the respective identifications in the cited registrations and applicant's application. See *In re Dixie Restaurants*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) ("Indeed, the second DuPont factor expressly mandates consideration of the similarity or dissimilarity of the services as described in an application or registration"); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"); and *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of

confusion must be decided on the basis of the respective descriptions of goods").

Here, while opposer's beds are specifically different from applicant's pillows, these goods are nevertheless complementary products in that applicant's pillows could be used with opposer's beds. Also, applicant has admitted that the parties are competitors in the field of bedding products and that the products are closely related.

While there is no evidence of record concerning the channels of trade for the goods of the parties, except that we must consider opposer's mark SUPERIOR SLEEPRITE to be used in connection with institutional furniture, opposer's beds and applicant's pillows may be sold in some of the same retail stores such as department stores, furniture stores and specialty bed stores. We also observe that pillows are relatively inexpensive items and that, contrary to applicant's argument, purchasers of such goods are not likely to exercise much care in the purchasing decision, a factor which favors opposer in this case.

Finally, if we had any doubt regarding our conclusion, in accordance with precedent that doubt must be resolved in favor of the registrant. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1707 (Fed. Cir. 1992).

In conclusion, we believe that a purchaser, aware of opposer's TO LIVE RIGHT SLEEP RITE beds (and perhaps also aware of opposer's SUPERIOR SLEEPRITE institutional furniture including beds and settees), who then encounters applicant's SLEEPRIGHT pillows sold in retail stores is likely to believe that these goods are made by the same company or are sponsored or approved by the same source.

Decision: The opposition is sustained and registration to applicant is refused.